IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973

No. 240-72

P. H. LEWIS, doing business as AIRCO ENGINEERS,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS IN CASE NO. 240-72

EDWARD J. BLOOM
2722 Livmor
Palm Springs, California 92262

Attorney for Petitioner

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TO THE COURT OF CLAIMS

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

AIRCO ENGINEERS here pray that a Writ of Certiorari be issued to review the final decree of the Court of Claims granting summary judgment to Respondent and dismissing Petitioners claims.

STATEMENT AS TO JURISDICTION

Jurisdiction to grant this petition is sustained by Title 28, U. S. C. A., Section 1255(1)

Jurisdiction of this Honorable Court is invoked by virtue of the 14th Amendment to the Constitution of the United States guaranteeing a litigant due process of law and equal protection of the laws. Petitioner having been denied the same by the decrees of the Court of Claims, to-wit:

a. That certain decree made and entered by the Court of Claims on the 19th day of April 1974.

Jurisdiction of this court is invoked on the ground that the summary judgment granted the United States in the Court of Claims denied petitioners 5th Amendment right to fair trial on the factual issues presented in the original petition.

Said judgment was entered April 19, 1974, by the Court of Claims under the Wunderlich Act and 41 U. S. C. A. 321 and 322.

See YMCA v. U. S.,
395 U. S. 85; 23 L. Ed. 2d 117;

U. S. v. King,
395 U. S. 1, 23 L. Ed. 2d 52 (1969);

U. S. v. Utah Const. & Mining,
384 U. S. 394; 16 L. Ed. 2d 642;

U. S. Constitution,
Article 3, #2 clause 2.

OPINIONS BELOW

P. H. Lewis doing business as AIRCO ENGINEERS petitions for a writ of certiorari to review a decision of the United States Court of Claims granting summary judgment to the United States for $28,493.26 and denying Airco Engineers petition for payments in excess of $107,000.00.

The opinion of the Court of Claims is not yet reported, is by Judges Byron Skelton, Nichols and Bennett, Court of Claims, Case No. 240-72, rendered April 19, 1974, and is included as appendix "A" to this petition. It adopts the opinion of trial Judge David Schwartz rendered November 15, 1973, which is included in and follows this petition as Exhibit "B." That opinion is based on the appended decision of the United States Department of Agriculture Board of Contract Appeals, appeal number 245 of Airco Engineers rendered December 20, 1971 and appended hereto as

Exhibit "C."

STATEMENT OF THE CASE

The contractor Airco alleged issues concerning fence, spring development, culverts, borrow, excavation, pipe, and clearing and grubbing, and further alleged wrongful termination of the contract and wrongful reprocurement. Contractors claim for $107,000.00 was rejected by the Board of Contract Appeals and on Cross Motions for Summary Judgment in the Court of Claims the United States was awarded $28,493.26 against Airco. The uniform rejection by the Board of Contract Appeals of Airco claims and the acceptance by the Court of Claims of the Administrative Decision argues that the statutory language applies that the Decision is arbitrary and capricious, so grossly erroneous as necessarily to imply bad faith, is therefor fraudulent and is not supported by substantial evidence.

Each of petitioners claims present a genuine issue of fact, all as set out in Airco's original petition to the Court of Claims.

ARGUMENT

Each case involving review of a Board of Contract Appeals decision as to claims under disputes clause of the contract, for adjustment in the contract price, must with respect to motions for summary judgment, be viewed on

basis of its own facts and circumstances, and in each case it must be decided whether there is any reasonable prospect that a trial would eventuate in a decision contrary to the summary judgment sought.

P L S Suit and Coat Corp. v. U.S.,
180 F.S. 400 (1960).

Controverted allegations can only be resolved by trial on merits, not by summary judgment.

Free v. Bland,
369 U.S. 663; 8 L.Ed. 2d 180.

Here the contractor Airco challenged the correctness of Board of Contract Appeals Decision upholding default termination of the Contract. Genuine issues of material fact precluded summary judgment. See:

Hicks Corporation v. U.S.,
487 F. 2d 520 (C.C. 1973).

The motion for summary judgment triggers a pretrial procedure designed to eliminate unjustified delay by limiting the use of cumbersome trial machinery to the resolution of disputed factual questions. As incorporated in Rule 56 of the Federal Rules of Civil Procedure similar to Court of Claims Rule 101, summary judgment makes possible the prompt disposition of a case on its merits without a formal trial if there is "no genuine issue as to any material fact."

A district court will generally grant summary judgment if the pleadings and papers filed by the parties establish, without substantial dispute, facts that entitle the movant to judgment as a matter of law. Thus, before the court may decide legal contentions under Rule 56, there must be no dispute as to any material question of fact. The moving party has the burden of establishing that there is no dispute, so that "the party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists." Whether a fact is "material" is, of course, determined by the legal theory to be applied to the case. Since summary judgment may not be used by the judge to invade the province of the jury, characterization of a disputed material question as one of "fact" or "law" involves a decision concerning whether the Court of Claims judges should accept as gospel an administrative decision or decide the question at a trial. Thus, if the parties have requested a trial, the judge should be reluctant to resolve disputed inferences of fact when there is a dispute as to the evidentiary facts.

Even if the case comes within the literal terms of Rule 56, Court of Claims Rule 96 and 101, a court may in its discretion deny a motion for summary judgment in recognition of the limitations on its effective and fair use under certain circumstances. For example, where material facts are largely within the moving party's domain a motion for summary judgment is usually denied as a transparent device to

avoid evidentiary tests of confrontation and cross-examination. Furthermore, courts seldom rely on summary judgment to decide cases involving complicated or voluminous evidence, especially when the legal question is novel or significant. As a result, it has been recognized that there are certain types of cases that by the nature of the issues involved do not lend themselves to summary adjudication. For instance, the Supreme Court has asserted that antitrust cases frequently are not susceptible to disposition by summary judgment. 1/ In the final analysis, discretion is guided by the prospective utility of a full evidentiary hearing. As Professor Moore has advocated, "(T)he basic principles governing the summary judgment procedure (should) be accommodated in a common sense manner to the realities of the litigation at hand." 2/

1/

See Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962). See also Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 506 (1969).

2/

6 J. Moore Federal Practice, Chap. 56, Note 3 at 2453.

A right to be heard means, at the least, the right of a party to present evidence and to test that offered by his adversary. Summary judgment rules, it is argued, abridge that opportunity.

Summary judgment is granted only when the papers filed with the motion clearly reveal that an evidentiary hearing would serve no useful purpose. Summary judgment honors the right to be heard by allowing the party opposing the motion to show the necessity for a trial and by placing the burden on the party seeking summary disposition. It protects fairness by relieving the parties of the burdens of a trial in those instances where it is reasonably clear that the ultimate decision will be based on evidence which can be presented without testimony.

This Court is now confronted with what ought to be accepted on this appeal as immutable facts, to-wit: Petitioner was not afforded a full and open hearing. A more flagrant disregard and contempt by the Court of Claims for the statute under which it was created would be difficult to imagine, and if the action of this Court of Claims is permitted to stand in this case, the procedural requirements under that statute, and all similar statutes, will be rendered meaningless.

Petitioner further urges to this Court that by reasons heretofore stated, application of Summary Judgment denying a trial is unconstitutional and that the Judgment of the

Court of Claims based thereon is void for that reason.

WHEREFORE, Petitioner respectfully requests that a Writ of Certiorari issue to the Court of Claims.

Dated July 16, 1974

Respectfully submitted,

EDWARD J. BLOOM

Attorney for Petitioner

APPENDIX EXHIBIT A

IN THE UNITED STATES
COURT OF CLAIMS

No. 240-72

P. H. LEWIS D/B/A
AIRCO ENGINEERS

v.

THE UNITED STATES

Before SKELTON, Judge, Presiding,
NICHOLS and BENNETT, Judges.

ORDER

This case comes before the court, having been submitted on the briefs without oral argument, on plaintiff's request, filed December 13, 1973, for review by the court of the recommended decision, filed November 15, 1973, by Trial Judge David Schwartz, pursuant to Rule 166(c) on plaintiff's motion and defendant's cross-motion for summary judgment and on defendant's motion for summary judgment on its counterclaim, Upon consideration thereof, since the court agrees with the trial judge's decision, copies of which have been furnished to the parties, it hereby adopts the said decision as the

basis for its judgment in this case.

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted and plaintiff's petition is dismissed.

IT IS FURTHER ORDERED that defendant's motion for summary judgment on its counterclaim is granted, the cross-motion to dismiss is denied and judgment is entered for defendant on its counterclaim in the sum of $28,493.26.

BY THE COURT

/s/ Byron Skelton
Byron Skelton
Judge, Presiding

APPENDIX EXHIBIT B

IN THE UNITED STATES
COURT OF CLAIMS

TRIAL DIVISION

No. 240-72

(Filed Nov. 15, 1973)

P. H. LEWIS d/b/a AIRCO ENGINEERS

v.

THE UNITED STATES

ON PLAINTIFF'S MOTION AND
DEFENDANT'S CROSS-MOTION FOR
SUMMARY JUDGMENT

William M. Apgar, attorney for record, for plaintiff.

Karen A. Berndt, with whom was Assistant Attorney General Harlington Wood, Jr., for defendant.

OPINION*

SCHWARTZ, Trial Judge: This is an action to review by the standards of the Wunderlich Act (41 U.S.C. §§321-22) a decision of the Board of Contract Appeals of the Department of Agriculture in various disputes arising under a contract for the construction of roads and a recreation area in the Apache National Forest in Arizona.

The Board rejected in whole or in part various claims of the plaintiff contractor for extras, changes and extensions of time, upheld the termination of the contract by the Forest Service for default and awarded the Government liquidated damages as well as the increased costs of completion of the work following plaintiff's default. Challenges to the propriety of these rulings are presented by cross-motions for summary judgment on the complaint and on the counterclaim for the awards made to the Government.

The Claims to Extras, Changes and Extensions of Time

1. Fencing. When holes and posts for

*/ The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 166(c). The necessary facts are stated in the opinion.

a fence around a spring had been dug and installed in part, the dimensions of the fence were so changed as required that the work be redone. The claim for materials was allowed as made. For the cost of labor the Board awarded $758.40, a reduction by $214 from the $972.40 claimed. Plaintiff contests the reduction.

Plaintiff's claim before the Board, made without supporting details, stated that the labor cost was $6 per hour per laborer, and that the total labor cost was $972.40; thus, by arithmetic, plaintiff was claiming 162 man-hours of work or approximately twenty 8-hour days. There was testimony that the work took "in the neighborhood of 5, 6 or 7 days, actually, maybe longer, I couldn't say."

Commenting that "we have no better evidence," the Board made what it called a "jury-type decision" to allow 6 days' work for 4 men, or 24 days of work, but at a lower figure than the $6 claimed. The Board computed its award as follows:

3 laborers for six 8-hour days (or 48 hours each) at $3.60 per hour - 3 x 48 x 3.60	$518.40
1 foreman for six 8-hour days (or 48 hours) at $5 per hour - 1 x 48 x 5.....	240.00
	$758.40

Plaintiff here simply repeats his asser tions to the Board; the claim is that "the figu of $6.00 per hour . . . more truly represent the out-of-pocket cost to the contractor." N supporting data is given, other than the irrelevant further statement that the "unit price is $6.00 per lineal foot."

This is feeble proof. Where a claiman alleges errors in board decisions on such matters as changes and extras, it is his duty to "single out facts or evidence showing that under the standards of the Wunderlich Act the administrative decision cannot stand." United Contractors v. United States, 177 Ct. Cl. 151, 178, 368 F. 2d 585, 605 (1966). The court will not itself search the record, withou adequate references and detailed challenges to the administrative findings. Williamsburg Drapery Co. v. United States, 177 Ct. Cl. 776, 781-82, 369 F. 2d 729, 732 (1966).

The motion does not contain the data requisite for a challenge to the Board's decision to be taken seriously. Claimants in plaintiff's position must realistically undertake to point out the evidence by which they propose to sustain the heavy burden of proof required to show a lack of substantial evidence to support a board decision. Koppers Co., Inc. v. United States, 186 Ct. Cl. 142, 149-51, 405 F. 2d 554, 558-59 (1968).

2. The Concrete Wall. The Board next is said to have erred in awarding $14 for 2.5 square feet of additional concrete used in

lengthening a concrete wall around the spring rather than the $205.49 claimed by plaintiff.

The Board relied on notes on the pictur of the completed structure. The only other evidence was plaintiff's testimony that: "The cost was practically nothing, but it was the idea of setting there on a $300.00 job two days to do the job. They said do it and we will pay you for it. We done it and they never did pay us for it." This is a conclusory assertion to which the Board need not give credit. Sternberger v. United States, 185 Ct.Cl. 528, 533-36, 401 F.2d 1012, 1015-17 (1968).

No error is shown.

3. Culverts at Big Lake Dam Road. Plaintiff challenges several rulings denying compensation or additional compensation to a total of $1,624 for repair and replacement of culverts at several stations on this road.

Station 0+51. At this culvert, the corre tive work was necessary, on the part first laid, because its bedding was not firm enough to resist the water gathered against it; in consequence water ran or "leaked" under it and the bedding washed out. Thereafter the piping in a second part was found to be too high and out of line with the stakes set for it.

The Board rejected hearsay testimony of a witness for plaintiff that the second part

of the corrective work was the result of a decision by the Forest Service to ease the turn of the culvert around a corner.

The Board's choice among witnesses, its views on their relative credibility, and its resolution of the conflicts in the testimony are not ordinarily reviewed in this court. Sternberger v. United States, supra, 185 Ct. Cl. at 536, 541, 401 F. 2d at 1017, 1019. No reason here appears to apply a different rule.

Station 7+50. The evidence supports the Board's conclusion that reinstallation of the culvert at this station was required by reason of defective work by plaintiff's workmen on the grade of the pipe and the camber of the bedding. Plaintiff summarizes some of this evidence in inconclusive fashion, without pointing out wherein the Board was wrong. No error is shown.

Stations 16+00 and 19+00. Culverts at these points were removed and reinstalled and plaintiff was compensated under a change order. The culverts are apparently the subject of the instant motion and yet, as was the case before the Board, plaintiff has nothing to say as to why he should be paid more than the amount provided in the change order. No error is shown.

Station 22+00. The culvert here was ordered uncovered and small dents "jacked out," that is, smoothed. Plaintiff maintains

that the dents were minor and did not impair the usefulness of the pipe.

The dents were made when a tractor operated by a subcontractor of the plaintiff drove over and "tore up" the culvert and plaintiff was "supposed to dig the culvert out, go buy a new one and put that in." The jacking out of the dents was apparently a compromise of lesser severity to the contractor. There was some testimony, on behalf of plaintiff, that the culverts were not so dented as to require repair. That a tractor for which plaintiff was responsible "tore up" the culvert is, however, sufficient to support the decision that plaintiff was responsible for the costs of repair.

Station 24/50. Here the undisputed evidence is that a live stream seeped in and made the bedding unstable, requiring corrective work to divert the stream. The motion does not point to any evidence reflecting on the Board's denial of the claim.

4. Culverts at Big Lake Forest Camp Road. Plaintiff's claim for $648 for extra work on three culverts, at stations 4/50, 11/50 and 15/50, was rejected by the Board and is renewed here.

Plaintiff's witnesses testified somewhat vaguely to installation and reinstallation, on the unjust demand of the Forest Service representative. Defendant's witnesses testified, with some support in documentary evidence,

that the culverts were excavated in one year, installed in the following year and that no such reinstallation took place as plaintiff claimed. Here, again, the Board chose between witnesses, and under the authorities cited there is no reason to differ with its decision.

5. Culverts at Big Lake Visitors Information Service Road. Here plaintiff claimed $864 as an extra for the work involved in taking out and reinstalling three culverts. No documentary evidence supports the claim. On directly conflicting testimony the Board found that the culverts had not been taken out. As is noted above, such decisions are not reviewed.

6. Culverts at Lee Valley Road. The Board disallowed all but $25 of a claim for $1,152 for extras in removing four culverts in order to perform needed additional earth compaction and to correct defective camber. Each party urges that the other was responsible for the defective camber.

It was the duty of the Government under the contract to determine the amount of camber, but it was the duty of the contractor to install the culvert according to that determination. There was testimony, believed by the Board, that the plaintiff's men were not knowledgeable in installing pipe with proper camber. The Board's denial of plaintiff's claim reflected this judgment on credibility, and there is no reason to differ with the Board.

7. Culverts at the Winn Recreation Area and Campground. Here the Board disallowed all but $112.50 of a claim for $1,728 for extra work on several culverts and for the costs of replacing others.

Plaintiff alleges that culverts were rejected which had once been accepted. The earlier acceptance, however, was acceptance of alignment and grade; the rejection thereafter, after the culvert was covered, was for insufficient compaction. The contractor planned to achieve the required degree of compaction by the passage of traffic over the incomplete road; the failure of this expectation was no fault of the Forest Service.

Plaintiff's broad claims of improper staking by the Forest Service were directly contradicted by Government witnesses who testified that the men engaged in installing culverts had difficulty in following directions on stakes and did not understand their job. The Board believed the Government witnesses, and no reason appears to review the Board's judgment.

8. Culvert Pipe Generally. Claims before the Board were amended and renumbered and additional claims were made in a series called "new claims." One such "new claim," for 300 feet of culvert pipe allegedly installed at the Winn Recreation Area, was summarily rejected by the Board as already considered under the claims discussed above. The claim is here renewed. No evidence is

cited to support it, and it is described in terms--"the forestry personnel directed each pipe culvert installed and removed numerous times and defective specifications [sic]"--which suggest that the claim is repetitious of the several claims for culvert work already disposed of above.

9. Alleged Questions of Law. The motion maintains that in connection with the foregoing claims it is necessary to interpret the provisions of the contract on such matters as camber. No specific error by the Board is alleged, and on such examination as the overgeneral language of the motion permits, the claims are seen to be no more than repetitions of contentions earlier made and disposed of above.

10. Waterpipe. A claim for over $18,000 for waterpipe raises two issues--whether, as plaintiff alleges, the pipe ordered relaid had earlier been approved while being laid or as laid, and whether plaintiff was paid for all the pipe required to be laid.

Photographs in the record support the testimony of defendant's witnesses that in plain violation of the specifications, the pipe had been laid on bare rock, without further excavation below it and without bedding, and less than 24 inches from the surface. Other evidence, too, showed the contractor to have been at fault, and justified the redoing of the work. There was no evidence worth credit to support the assertion that the work had

earlier been approved, while it was being done.

The claim for an amount of pipe is based on invoices for amounts purchased by plaintiff. The Board's decision is based, justifiably, on testimony for defendant as to measurements of the amounts of pipe actually used.

This claim, too, is without merit.

11. Borrow. The Board rejected to the extent of $6,834 a claim for additional borrow. Three elements of the decision are complained of--the computations used by the Board, deductions made from the amounts excavated and denial of compensation for borrow from non-contract pits.

The Board accepted the computations of the Forest Service, performed at the time of excavation by the method prescribed in the contract, as against post facto figures supplied by plaintiff. The Forest Service computations were spot-checked by the Board. Its rejection of the informal and after-the-event calculations by plaintiff's men was a decision on the credibility of conflicting evidence which will not be disturbed.

The deductions made from excavated borrow were on account of borrow shown to have been wasted elsewhere and, also, for borrow needed to compensate for overexcavation. The deductions were essentially

a denial of compensation for materials needed and used to repair the contractor's errors.

As to the denial of compensation for borrow from outside the prescribed pits, such borrow could not be and was not measured by the survey, elevations and cross-sectioning of the borrow pits prescribed by the contract for the determination of the amounts excavated and to be paid for.

No error is shown.

12. Excavation. Claims for excavation of more cubic yards than estimated in the contract, and for time extensions, were denied in whole and in part.

The rejection of the claims on the issue of quantity was a decision on a conflict of evidence as to measurements, similar to the conflict of testimony on the amount of borrow discussed above. As there, no error is shown here.

As to the claimed time extension, in the case of the excavation claim allowed in part, the Board noted that there was little evidence to go on; that presumably the work, in a limited area, could have been done simultaneously with the other work. The contract, however, called for $233,000 worth of work in 221 days. Using these figures "as a rough yardstick" indicating $1,000 worth of work as requiring 1 day, the Board allowed an 8-day time extension as an accompaniment of its

award of $8,289.60 for excess excavation.

Plaintiff claims that this decision was in error and that he is entitled to a 34-day extension. No supporting data is given.

A further claim for a 3-day extension of time because of "experimental work" is wholly unsupported by proof.

13. Clearing and Grubbing. The Board denied and granted only in part various claims for compensation for clearing and grubbing. Among those denied was a claim for the clearing of 1.22 acres of debris at Big Lake Forest Camp Road left from an earlier lumbering operation.

The testimony for defendant was that the debris had been created by plaintiff's workmen who did not burn waste materials as they accumulated. The Board accepted defendant's explanation and accepted also the defendant's computations made by the standard method of measurement, as against plaintiff's measurements, made 2 years after the work was done.

At the Winn Recreation Area plaintiff claims to have cleared 11.521 acres in addition to the acreage as measured by defendant. Here, too, the Board accepted the defendant's figures, supported by records and calculations.

These were decisions on conflicting evidence; no error is shown.

14. Time Extensions. Various requests for time extensions in connection with the foregoing claims were denied by the Board and the rulings are here challenged, without, however, any details or supporting proof beyond that considered and rejected above, other than a reference to the 6 days used by the Board to compute the allowance for the change in the fence, discussed above. The allowance made for 6 days of labor does not mean that the project was delayed for 6 days. The use in connection with excavations of a rough yardstick relating job dollars to days of delay does not prove error in the denial of a time extension for the work on the fence. The excess excavation, for which $8,289.60 was awarded, was the subject of an extension of time of 8 days. The total award for the fence was $1,145. Though the Board's computation assumed that the work took 6 days, the actual work was limited to an extremely small area and could have been done without delay to the rest of the project. There is no showing of any delay in the completion of the project by reason of the extra work on the fence.

In the absence of argument and proof by plaintiff no basis exists for speculation that such extras and constructive changes as were the subject of awards were, also, the cause of delays in the completion of the project. The general picture of plaintiff's work to be gathered from the record is that of inexactness and near-confusion. Delays in completion cannot, therefore, be said to have

been caused by such extras and changes as were allowed.

No error is shown in the denial of time extensions.

The Termination for Default

The Board upheld the termination of the contract for a default consisting of such lack of progress in the work as meant that plaintiff would not finish by the extended completion date. Aside from challenges on grounds rejected above in connection with the claims to extras, changes and time extensions, the decision upholding termination is attacked on the basis of the date and other circumstances of the termination.

The facts are these: In the spring of 1969 the 221 day contract time period for completion had passed. The parties met on June 10, 1969 to fix a new completion date, and their agreement was set out in a letter of June 13, 1969 from the contracting officer to plaintiff. The letter stated that time was of the essence; that all work remaining would be completed within 45 calendar days from June 16 (3 days hence, when the letter might be received); that eight described items of work would be completed within stated deadlines; that all needed equipment would be brought to the site in time to prevent delay in completion; and that if plaintiff failed within 10 days of the receipt of the letter to take action to complete the eight items and to perform

"substantial work"--a phrase which meant "at least $16,000 work of work"--in "a continuing manner," action would be taken to terminate the contract under clause 5(a) of the contract, Termination for Default. 1/

Following an inspection on June 27, at the end of the 10-day period, the contracting officer wrote to plaintiff on July 3 that

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1/ Clause 5(a) provides:

"If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time."

sufficient work had been done to withhold a termination for default, but that he expected performance "to be on a full-scale continuous and productive basis with final completion within forty-five (45) calendar days from June 16, as we agreed." Failure to make further satisfactory progress, he warned, might lead to termination; the letter stated:

> The determination to let you continue does not, however, preclude my taking action to terminate your right to proceed in the future should contract performance become unsatisfactory.
>
> * * * * * *
>
> I will be making periodic on-site reviews of the work progress. Should any of my reviews reveal that unsatisfactory work progress is being made and that work completion will not be within the 45 days allowed, I will again consider taking action to terminate your right to proceed.

At the end of the second 10-day period, on July 9, the contracting officer terminated for default; he informed the plaintiff, in a detailed letter dated the next day, that he had made an inspection on July 8 and had determined that plaintiff had made so little progress as meant he could not finish in the 45-day period.

Plaintiff claims that he did not agree to or that he was coerced into agreement to the 45-day extension. These are assertions without supporting data. There is no evidence of coercion; the lack of objection by plaintiff to the letters stating the agreement, alone, is sufficient evidence to support the conclusion of agreement to the 45-day extension.

Because of his lack of agreement, plaintiff adds, the extension was required to be reasonable. The 45-day period seems reasonable enough in the circumstances, and plaintiff has neither suggested any other time as reasonable nor sought to show that he could have performed within any period deemed reasonable. See Abraham Potter et al. v. United States, 167 Ct. Cl. 28, 33, 36, 38 (1964), cert. denied, 382 U.S. 817 (1965).

Alternatively to his claims of ineffective agreement, plaintiff maintains that the Government, having agreed to a 45-day extension to July 31, was unable to terminate for default before that date.

The detailed grounds stated by the contracting officer for the termination were lack of progress to June 27, lack of progress between June 27 and July 8, and a state of affairs--including the failure to have at the site the equipment necessary if plaintiff were to finish on time--which showed the plaintiff could not finish the work by July 31, the end of the 45-day period.

Progress to June 27 had been found satisfactory, in the letter of July 3. The precise rate of progress in the two 10-day periods (June 16 to June 27 and June 27 to July 8) is, also, not the issue.[2/] The issue is whether, on it appearing on July 8 (as it does, without challenge by plaintiff) that plaintiff could not finish by July 31, termination for default was nevertheless beyond the Government's power by reason of its agreement to an extension of completion date to July 31.

2/ On this, varying statements appear in the record. In the letter of July 10 it is said that of the $74,000 (all figures in this footnote are rounded off) worth of work to be done in the 45 days, $15,000 had been done by July 8, of which $2,000 was done between June 27 and July 8. There was, however, testimony that $17,000 had been done by July 8, of which $5,000 had been done between June 27 and July 8. There was certainly very little progress between June 27 and July 8; it appeared that plaintiff had done no work from July 1 to July 8.

While these figures meant that either $59,000 or $57,000 of work was undone as of July 8, there is also in the record an estimate that $47,500 worth of work was undone as of that date.

This issue is determined in favor of the Government. Clause 5(a), quoted in note 1, supra, gives the Government the right to terminate for lack of prosecution of the work with "such diligence as will insure its completion within the time specified in this contract, or any extension thereof." This clause was not waived by the 45-day extension, and indeed the contractor was warned in the letter of July 3 that he might be terminated should periodic inspections show that unsatisfactory progress was being made and that the work could not be completed within the agreed 45 days. The right to terminate was ultimately exercised when the state of affairs specified in clause 5(a) in fact developed--that so little progress had been made as meant the work would not be completed by the extended date. No error is claimed in the Board's conclusion that this state of affairs did appear, and thus there is no substance in the argument that the Government could not terminate before the end of the 45 days.

No error is shown in the ruling upholding the termination for default.

The Awards of Liquidated Damages and Excess Reprocurement Costs

The Board awarded the Government both liquidated damages and increased costs of completion of the defaulted work. The Government has counterclaimed for the amounts awarded, and the parties have made cross-

motions for summary judgment on the counterclaim.

Liquidated Damages. The Board found the plaintiff responsible for 124 days of delay beyond the contract period and assessed liquidated damages at the contract rate of $100 per day, a total of $12,400.

Aside from a repetition of contentions disposed of above, plaintiff maintains as a general proposition that both liquidated damages and excess reprocurement costs cannot be awarded -- that they are duplicative and mutually exclusive.

No support for the contention can be found in the terms of the contract. On the contrary, the contract is clear that in case of termination for default, the Government may recover both types of damages. Clause 5(b) of the General Provisions of the contract provides that on termination for default, where liquidated damages are provided in the contract (as they are here, at the rate of $100 per day) the damages are to consist of "such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work." 3/

3/ Clause 5(b) provides as follows:

"If fixed and agreed liquidated damages are provided in the contract

(continued on page B-22)

Nor is there any impediment to such an agreement in the nature of the two types of damages. Liquidated damages are a time-honored substitute by the parties for actual damages. A liquidation of damages by agreement avoids the need to make proof on trial. If reasonable in amount and without elements of forfeiture, a liquidated damages clause will be enforced by the courts. Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947); Young Associates, Inc. v. United States, 200 Ct.Cl. 438, slip op. p. 6, 471 F.2d 618, 621-22 (1973). In the case of a contract for the construction of a road, liquidated damages are ordinarily intended to cover the loss to the Government and the public of the use of the completed road and the greater expense -- both administrative and engineering -- incurred by the Government in the administration of the contract for a greater period than originally contemplated. Young Associates, Inc. v. United States, supra. Plaintiff makes no attempt to show that losses of this

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3/ (continued from page B-21)

and if the Government so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work."

type were not here sustained or that the amount fixed in the contract as the liquidated substitute for damages to be calculated on trial was not reasonable.

The increased costs of completion -- "the increased costs occasioned the Government in completing the work" -- are just what they say they are -- the extra cost, over the contract cost, of getting the work done when the contractor defaults. 4/

The provision for such costs, in the contract, is little more than the law would provide in the absence of a special clause. At common law, a contractor who leaves a building unfinished is liable for the reasonable cost of construction and

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4/ The increased costs clause in this contract, a construction contract, is much less detailed than the comparable clause -- called an excess reprocurement clause -- in the Government's supply contracts, e.g., clause 11(b), General Provisions, Standard Form 32, Supply Contracts, which provides that on termination for default the Government may procure the same or similar items on the terms and in the manner it deems appropriate and "the Contractor shall be liable to the Government for any excess costs of such similar supplies or services." See Marley v. United States, 191 Ct. Cl. 205, 219-22, 423 F. 2d 324, 331-34 (1970).

completion in accordance with the contract, in practice the costs of completion less the unpaid contract price, or, if uneconomic, the difference between the values of contract and actual performance. Restatement of Contracts § 361(1) (a) (1932); Illustration 1 to § 346 (1). The contractor who delays completion of a building constructed for use is liable for the value of the use of the building during any delay in completion chargeable to him. Restatement of Contracts, supra, § 346 (1) (b). And the contractor who causes delay beyond the contract completion date and leaves his work unfinished is liable for both types of damages -- damages for delay (or liquidated damages) and the increased costs of completion. Southern Pac. Co. v. Globe Indemnity Co., 21 F.2d 288 (2d Cir. 1927) (unfinished and delayed construction of ships); Fleming v. Twine, 58 A.2d 498 (D.C. Mun. App. 1948) (buiilding); Restatement of Contracts, supra, §346(1), Illustration 1. Cf. Marshall v. Anderson Constr. Co., 283 Minn. 320, 167 N.W. 2d 724 (1969); North Denver Bank v. United States, 193 Ct. Cl. 225, 432 F.2d 446 (1970) (liquidated damages for delays while contract being completed by surety).

In Southern Pac. Co. v. Globe Indemnity Co., supra, the construction of three ships was delayed and finally left unfinished. The Second Circuit allowed both types of damages though the contractor's abandonment of the work could be said to have been a repudiation of the contract.

The court, speaking through Judge Swan, preferred the "number of decisions which permit the owner to recover, not only the increased cost of completing the abandoned contract, but also liquidated damages for delay caused by the contractor's breach." 21 F.2d at 291. The contractor was held liable for delays occurring both before he abandoned the work and delays, caused by the default, in the course of completion by the owner.

Illustration 1 to § 346(1) of the Restatement of Contracts embodies the principle of liability for both types of damages:

> A contracts to erect a building on B's land for $10,000, but repudiates the contract after B has paid $2,000. The cost at which B can obtain the completion of the building by others is $12,000; and the rental value of the house during the period of delay is $500. B can get judgment for $4,500, the cost of completion ($12,000), less the part of the price not yet paid ($8,000), plus the lost rental ($500).

See also McCormick, Damages § 169 (1935).

Common law damages for delay -- and its substitute, liquidated damages for delay -- and damages for the increased cost of completion are thus seen to be compensation

for essentially different harms. There is therefore nothing in law or policy to prevent the parties from expressly providing for both types of damages, as they did here. The award of both types of damages is unobjectionable.

Excess Reprocurement Costs. The award for increasec costs of completion is based upon the award by the Government, following plaintiff's default, of a contract for the completion of the work remaining. The cost of this contract, $109,096.84, plus the amount paid to plaintiff under the contract, $138,405.20, less the original contract price of $221,783.68, leaves $25,718.36 as the "increased costs occasioned . . . in completing the work," awarded by the Board under clause 5(b), note 3, supra.

Plaintiff would reverse the award on these grounds: First, plaintiff says that the reprocurement contract called for new or additional items; an examination of the two contracts shows the charge baseless. A variation of this charge is that because the reprocurement contract was on a lump sum basis and the original contract was on a unit quantity basis, the contracts were different. There is no such difference as prevents the new contract from being used as a measure of the increased costs of completion of the work. The work to be done was that left undone by plaintiff. The bidders were able to estimate, from the

records and from what they could see had been done, what work needed to be done to complete the old contract, and in any event the new contract price was subject to adjustment for actual quantities of work performed. (On such adjustment, the reprocurement contractor, whose bid had totalled $114,000, received $109,096.84).

Lastly, plaintiff maintains that the cost of the new contract was extravagant and unreasonable, citing as proof the difference of 100 percent or more between the bid price of the new contract, $114,000, and the amount of work remaining to be done in connection with the termination for default -- on various estimates of either $59,000, $57,000 or $47,500. The question is whether this difference is so large as to prevent the Government from carrying its burden of "proof of a reprocurement action reasonably designed to minimize the excess costs." Marley v. United States, supra n. 4, 191 Ct. Cl. at 221, 423 F.2d at 333.

The difference is indeed large and by itself might suggest an unreasonably high cost of completion. It appears, however, that the Government engineer estimated the job at $109,000 (the amount ultimately paid to the new contractor) and that the Government sent invitations to bid to 12 firms found to be interested, received five bids, and accepted the lowest bid. The award was thus based upon competitive

bidding. Such bidding, as the court recently said in a reprocurement costs case, "offers firm evidence that the price was reasonable." Astro-Space Laboratories, Inc. v. United States, 200 Ct. Cl. 282, slip op. p. 24, 470 F.2d 1003, 1018 (1972). The disparity between original contract costs and reprocurement cost is attributable, according to the Government, to inflation in costs between May 1967, the time of the bids on the original contract, and August 1969, the time of the reprocurement bids. The mentioned Government engineer's estimate, made at the time of reprocurement and based onthe existing price levels, is consistent both with the explanation of the difference between old and new contract prices and of the reasonableness, at the time, of the accepted bid. The Board, not unfamiliar with rising price levels, approved the Government's case and held the reprocurement reasonable and its product a reliable measure of the increased costs to which the Government is entitled under the contract.

The standard for reviewing the Board's award of increased costs is the same substantial evidence rule as is applicable to its decision on the contractor's claims. Astro-Space Laboratories, Inc. v. United States, supra. There is substantial evidence to support the decision.

All the claims of plaintiff having been found to be without merit, plaintiff's motion for summary judgment on the complaint should

be denied, defendant's motion granted, and the complaint dismissed.

The amount of the counterclaim is $28,493.26 comprised of $12,400, the amount awarded as liquidated damages, and $25,718.36, the amount awarded as increased costs of completion, less the sum of $9,625.10 awarded by the Board to plaintiff on a claim not in dispute. The motion for summary judgment on the counterclaim should be granted, the cross-motion to dismiss denied, and judgment entered for the Government on the counter-claim in the sum of $28,493.26.

APPENDIX EXHIBIT C

DECISION
OF THE
BOARD OF CONTRACT APPEALS
UNITED STATES DEPARTMENT
OF AGRICULTURE

APPEAL NO. 245
AIRCO ENGINEERS

On May 24, 1967, the Forest Service of the Department of Agriculture awarded Contract No. 16-916 for a contract price of $233,248.05 to Airco Engineers, a proprietorship owned by P. H. Lewis (hereinafter referred to as the Appellant or the Contractor). The contract provided for the construction of Big Lake, Lee Valley, Winn Roads, and the Winn Recreation Area in the Apache National Forest in Arizona. The contract included five separate jobs or projects and provided for clearing, grading, culvert installation, placing base course, placing aggregate surfacing, bituminous surface treatment, and other incidental work as required in the specifications. The jobs covered by the contract are referred to by various designations as follows:

Project 1113A - 0.6 miles of Big Lake Dam Road
Project 1559 - 0.4 miles of Big Lake FC Road

Project 1115 - 0.1 miles of Big Lake VIS Road
Project 1113E - 0.5 miles of Lee Valley Road
Project 1554 - 2.5 miles of Winn Recreation Area and Campground

Appellant submitted ten initial claims, some of which were amended or incorporated in eleven "new claims."

The Contracting Officer issued a decision dated March 15, 1968, with regard to the ten initial claims, and a further decision March 27, 1970, with regard to the eleven new claims. Appellant entered a timely appeal with respect to each of these decisions.

On July 10, 1969, the Contracting Officer issued a default termination of the contract from which Appellant appealed on July 28, 1969.

The appeals from the two decisions of the Contracting Officer, the appeal from the termination for default and counterclaims of the Government for liquidated damages and increased costs paid to the reprocurement contractor are all considered in this decision.

THE TEN CLAIMS AS AMENDED OR MODIFIED BY THE ELEVEN "NEW CLAIMS"

Claim No. 1

This claim in the amount of $1,359.60 is for extra costs alleged by Appellant to have been incurred because a representative of the Forest Service staked a fence in a manner which was inconsistent with the plans and later directed Appellant to remove the fence and set it at a new location.

The fence was designed in connection with Job No. 5, Project 1554, Winn Campground. According to Appellant's witness, Tom Wood, the fence was to be built around an enclosed spring which contained the water supply for the campground (T-15). The Contracting Officer's findings state that the fence was staked as a square with

built with posts on eight-foot centers and the sides 100 feet long (T-403).

Willis Lee Smith testified that since the plans did not prescribe a beginning point for the fence, he selected the corner closest to the gate (T-119). This was not the control corner selected by the Forest Service. There was, however, no corner designated on the plans as a control corner.

The evidence with regard to the fence is conflicting. Smith, for the Contractor, testified that the stakes to designate the location of posts had been placed every eight feet (T-123), whereas Mr. Kimball, for the Forest Service, stated that only four stakes were set, one at each corner of the enclosure (T-344). Mr. Kimball agreed, however, that there had been a change in the staking which resulted from changing the dimensions of the enclosure from 100 by 100 feet to 96 by 96 feet (T-404). There being nothing in the plans or specifications to indicate that any particular corner was a control corner, the Board finds that there was a constructive change when the dimensions were changed after work was begun on the fence. 1/ There

1/ The contract includes Article 3, Changes, S. F. 23-A, under which the Contracting Officer may, by written order, make changes in the drawings or specifications if within the general scope of the contract.

(continued on page C-5)

is conflict in the evidence of the amount of work which had been done on the fence when the error in staking was discovered. Mr. Kimball stated that the equivalent of holes for one side had been dug, but no posts had been set (T-341).

Smith, the Appellant's job foreman for building the fence, as noted above, testified that holes for two sides and part of a third side had been dug and posts were installed in all of one side. It was necessary, according to Smith, "in a lot of occasions . . . to use dynamite to blow out the rock . . . ." (T-106, 109).

Having decided that there was a constructive change, the Board must determine the amount of equitable adjustment to which Appellant is entitled. The job foreman testified that the change of all holes, removal of all the posts, installing and redrilling all holes involved 5, 6, or 7 days, or longer (T-107-109). The evidence with regard to the length of time

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1/ (continued from page C-4)

An equitable adjustment is provided for any increase or decrease inthe contractor's costs resulting from such change. It has been held that this clause contemplates recovery by the contractor of costs incurred in attempting to perform under deficient specifications and drawings. Pastushin Industries, Inc., ASBCA 7663, 1963 BCA Paragraph 3757; Fletcher Aviation Corp., ASBCA 7669, 1963 BCA Paragraph 4192.

consumed in correcting the work is sketchy and inconclusive. The Appellant's breakdown follows:

Labor	$ 972.40
Equipment rental	326.00
Blasting materials	61.20
	$1,359.60

Since Appellant's witness estimated the corrective work required 5, 6, or 7 days, or longer, and we have no better evidence on this point, it appears proper, on a jury-type decision, to allow six days work, and to compute the adjustment based on three laborers and one foreman as follows:

Labor at $3.60/hr. - 8 hrs. - 6 days =	$ 518.40
Foreman at $5.00/hr. - 8 hrs. - 6 days =	$ 240.00
	$ 758.40
Equipment rental	326.00
Blasting materials	61.20
	$1,145.60

On the basis of the evidence in the record the Board finds that Appellant is entitled to $1,145.60 for extra costs incurred as a result of change in the dimension of the fence.

Work Order F specified that posts used in the fence must have a minimum diameter of eight inches. Change Order No. 3 deducted $38.40 because the posts

delivered did not comply with Work Order F. Since the original contract was silent on this point, and the posts were accepted, the Board restores the $38.40 to Appellant deducted under Change Order No. 3. In reaching this decision, the Board is aware that Change Order No. 3 was accepted by Appellant, but finds that there was no consideration for such acceptance since an amount was deducted from funds otherwise payable.

Claim No. 2

Appellant submitted a claim for $205.49 for changing the length of the concrete wall in connection with the spring development. The Contracting Officer's Findings show that after the area around the spring was opened up and mucked out, it was found that "the specified dimensions of the retainer wall would not precisely fit what was needed to tie the wall into the solid rock around the spring." The Contracting Officer stated further, "The Contractor's employees did make an angle change in one wall to tie in to the solid rock which was agreeable."

The Board finds that there was a constructige change when Appellant was required to perform this additional work and used additional material in making changes in the spring development. Notes on the pictures of the completed structure show that 2.5 cubic feet of additional concrete

was used. The Board further finds that $150 per cubic yard is a reasonable price for concrete and the carpentry work incident thereto. Appellant's additional cost is computed as follows:

$$\frac{2.5}{27} \times \$150 = \$14.00 \text{ for the additional concrete}$$

There was additional labor in removal of filter material to allow for inspection of the overflow pipes and proper installation of that pipe. This must be borne by Appellant since this resulted from Appellant's fault or negligence. Work Order L stated that the overflow pipe was not installed in accordance with the plans and required that work be performed to correct this condition. Article 10(e) of the General Provisions of the contract provides that at any time before acceptance of the entire work, the contractor is required, upon request, to remove or tear out work for inspection, and that if the work is found defective due to fault of the contractor or his subcontractor, the contractor shall defray all expenses of examination and of satisfactory reconstruction.

Claim No. 3

This claim relates to the removal and replacement of culverts on Job No. 1, Project 1113A at Stations 0 + 51, 7 + 50, 16 + 00, 19 + 00, 22 + 00, and 24 + 50.

The amounts claimed for the culvert at 0 + 51 is $352.00 and for all the other culverts is $1,272.00.

Item 209 of the Specifications sets forth the requirements for Corrugated Metal Culvert Pipe. This item provides, Sec. 3.2,

> The bedding shall provide a firm but slightly yielding foundation of uniform density throughout the entire length of the culvert and shall in general be slightly cambered in direction parallel with the pipe center line to correct for expected settlement and insure tight joints in the lower half of the pipe. The amount of camber will be determined by the engineer.

This item 209 also provides that if rock is encountered inpreparing bedding, it shall be removed below grade and replaced with suitable material insuch manner as to provide a compacted earth cushion with a minimum thickness of eight inches under the pipe. If spongy material is encountered, it shall be removed to the depth directed by the engineer and replaced with gravel or other suitable selected material to provide adequate support.

Section 3.4 "Placing Pipe" provides,

> . . . During construction adequate cover must be provided to proect the structure from damage.
>
> * * * * *
>
> Any pipe which is not in true alignment or which shows undue settlement after being laid, or is damaged, shall be taken up and relaid or replaced without extra compensation.

With regard to the culvert at 0 + 51, a part of this culvert was installed on July 14, 1967, and then on August 29, the culvert was removed as there was water running under the culvert at that time. Mr. Kimball testified (T-345) that this indicated that the bedding was not firm enough to resist water gathered against it. Mr. Kimball further testified that in June 1968 the lower invert of the pipe was found to be two feet too high and two feet out of line according to the stakes set for this culvert. The pipe was removed and replaced by July 10, 1968, this being the first time all three sections were jnstalled (T-345). There is some evidence that some of the change may have been the result of a decision by the Forest Service that "the corner was too sharp" so they would ease the rurn (T-29). This testimony was not given by a man who was on the job at the time and was hearsay.

On the basis of the evidence before us, we conclude that any changes made were to

make the work conform to specifications and, accordingly, the claim for $352.00 for work on this culvert is not allowed.

With regard to culvert at Station 7 + 50, Mr. Kimball testified that the men working for the Contractor did not understand that the bedding had to be solid and firm and could not be mushy and have foreign material laid against the pipe. He also testified that the workmen did not understand camber and had not installed at first in accordance with specifications (T-348). There was no evidence to the contrary.

By Change Order No. 4, Appellant was compensated for removing and reinstalling culverts at 16 + 00 and 19 + 00. The culvert at 16 + 00 was not made from proper stakes and the Forest Service representative was present and allowed improper installation. The Change Order directed that the culvert at 19 + 00 be relocated at approximately 17 + 65. This culvert was located improperly from correctly placed original slope stakes under the inspection of the Forest Service representative. Additional compensation was allowed in the amount of $180.20. At a later time the Contractor dug down and jacked out a dent in the culvert at 17 + 65 (T-454). Nothing in the record indicates that Appellant is entitled to more for these culverts than was agreed to in Change Order No. 4.

Evidence shows with respect to the culvert at 22 + 00 that it was uncovered to jack out small dents. The culvert had been damaged by a tractor owned by a Mr. Phillips, who was performing some work for the Contractor (T-174, 176), and the culvert was installed only once (T-355). Since the Contractor was responsible for protection of the work until final acceptance, there is no valid claim. 2/

The Appellant considered that compacting the soil could be accomplished by putting culvert in, dumping the material in and allowing traffic going over the culvert to compact it to 90 percent compaction (Kimball, T-450). Appellant was permitted to do this with the understanding that if compaction did not meet the required specifications the work would be corrected (T-450).

There was some testimony by Mr. Lewis with regard to culverts at Station 24 + 50, but nothing to show improper rejection of these culverts by the Government (T-177). Completion at 24 + 50 was delayed by a live stream (T-355-357). There were unstable bedding conditions which were corrected (T-606).

2/ Section 5.10, General Requirements (6300-3 (Rev. 8-61)) provides, in part "Until final acceptance of the work . . . the contractor shall have the charge and care thereof and shall take every precaution against injury or damage to any part thereof by the action of the elements, or from any other cause. . . ."

In general, Appellant's claims relating to culverts are based principally upon being required to take out and reinstall culverts after they had been "accepted" by the Forest Service. The record shows that this was simply not the case with respect to many of the culverts and in any event Section 3.4 of the specifications quoted above requires that the contractor take up and replace without extra compensation pipe not in true alignment or which showed undue settlement.

The evidence shows that the placement of pipe was sporadic and piecemeal. Partial sections were placed (T-345-347). Sections were started and not finished for months (T-345).

We have found under this claim that any extra work was either compensated for under Change Order No. 4 or was the Contractor's responsibility in order to comply with specifications.

Claim No. 4

Claim No. 4 in the amount of $648.00 for extra work alleged to have been performed on Job No. 2, Project 1559, in connection with culverts at stations 4 + 50, 11 + 50, and 15 + 50.

The culvert at 4 + 50 was completed on July 9, 1968 and no further work was required. This work had been started in

1967 but had been halted when rock was encountered (T-358). The culverts at 11 + 50 and 15 + 50 were installed on July 9 and July 11, 1968 and were approved on those dates (T-359, 360). Although there are some inferences to the contrary by a man who was on the job in 1968 but not in 1967 (T-27), the weight of the evidence is to the effect that no extra work was involved in the installation of these culverts. The claim is not allowed.

Claim No. 5

Claim No. 5 in the amount of $864.00 is for extra work said to have been performed on culverts at 0 + 16, 2 + 40, and 5 + 44 on Job 3, Project 1115. There is, however, no evidence that any of these culverts were ever taken out and reinstalled. There is evidence that the earth at one of the culverts needed some extra compaction onone occasion (T-361). However, there is no showing of performance of extra work for which the Contractor should be compensated. This claim is not allowed.

Claim No. 6

Claim No. 6 involved culverts at stations 4 + 00, 10 + 00, 15 + 00, and 20 + 00 on Job 4, Project 1113E. It is in the amount of $1,152.00. There is evidence that the earth at all of these culverts required

additional compaction and had to be removed and replaced for that reason (T-363-366). This was required, however, to bring the work into conformity with the specifications and is not a basis for additional payment to the Contractor.

There is evidence on behalf of the Appellant of a constructive change at station 10 + 00 or 15 + 00. The pertinent testimony was, "We were instructed to put the end section and elbow, by the inspector in a certaindirection, which we did. Two days later we were instructed to take it out and put it in the opposite direction because the water didn't flow the way they wanted it." (T-34) No later testimony repudiates this statement. There is certainly a minimum of evidence on this point; however, we have never expected an Appellant who is trying to effect recovery on what is essentially cost basis to break down the costs to each small item which we might find allowable. The bid price of end sections is $50.00. We allow half of this as labor and find that the Contractor is entitled to $25.00 for this additional work.

Claim No. 7

This claim in the amount of $1,728.00 is for additional work on culverts at stations 11 + 34, 11 + 52, 13 + 00, 23 + 00, 37 + 00, 42 + 00, and 55 + 00 on Job No. 5, Project 1554.

Culverts at 11 + 34 and at 11 + 52 had to be raised because the Apache Railway Company had changed the grade of the railroad. The culvert at 11 + 52 was excavated, to the new elevation, the trench was backfilled, the material was compacted and Appellant was allowed 1.3 yards of excavation for the overexcavation in this trench. The Board finds that this did not provide adequate compensation in view of the fact that the extra excavation, the fine grading and backfill duplicated that required for a single installation and was not comparable to the roadway and drainage item in the contract. Appellant included in his bid a unit price of $15 per linear foot for this culvert pipe. Accepting Appellant's statement (T-267) that 25 percent of the $15 per foot was for excavation, the Board finds that there was a contructive change, and allows Appellant 25 percent of $15 per foot or $3.75 times the length of 30 feet, or $112.50.

The testimony with respect to several of the culverts on this project cannot be reconciled. A witness on behalf of the Contractor has stated that few of these culverts were staked properly (T-148), and several were installed from two up to seven times (T-248). On the other hand, the engineer for the Government testified that they had not been installed that many times, that the original compaction had not met specifications, that the Contractor had been instructed to redo the compaction by Work Order C, and that this was finally done, but that in the

meantime some of the culverts had been damaged and had to be jacked up (T-368-372).

Inasmuch as this is the last claim for extra work on culverts, it is perhaps appropriate at this point to make a general statement concerning this part of the work. There is no question about the fact that culvert installation turned out to be expensive and involved more work than the Contractor contemplated. Some of the difficulty arose from the Contractor's idea of obtaining the specified earth density of 90% Standard AASHO in the vicinity of the culverts by traffic passing over the incomplete road. Perhaps the idea was so bad that the Government should not have allowed the Contractor to proceed in this manner. To say so at this point would, however, constitute the use of hindsight. There was also evidence that some of the workmen engaged in the installation of the culverts were not competent and had difficulty in following directions on stakes and did not understand camber.

Testimony of the Contractor and his employees was to the effect that most of the difficulty was caused by Government engineering errors and by the requirement that culverts be removed which had previously been approved. This was refuted in testimony of Government witnesses. It is, of course, easy to see that a culvert may have been properly laid and approved for alignment and camber, but after it had been covered, if it was subsequently found that traffic did not provide the required compaction, orders to

remove and recompact the fill would be issued. However, what we have in such a situation is not the rejection of a culvert which had been approved, but the rejection of compaction which had never been approved.

On these claims, we have found that the Contractor is entitled to receive compensation only for the two items mentioned above in the amounts of $25.00 and $112.50.

Claim No. 8

This claim was originally for 1,600 cubic yards of additional borrow or $2,400, based on a large ditch running across the borrow pit, 20 feet wide and 7 feet deep. New claims Nos. II, V, and VIII made claim for $1,747.50, $2,149.50, and $1,395.00 on Jobs 1, 4, and 5, respectively. Since all of these claims deal with alleged underpayment for borrow, we will consider them together. The decision of March 27, 1970, in response to the new claims, made adjustment in borrow allowances based on field surveys of cross sectional areas as shown in Exhibits "O" and "R" of the decision. Two borrow pits were used, S. V. Knoll Borrow Pit, and Big Lake Dump Borrow Pit. The decision allows additional payment in the amount of $1,779.00 for additional borrow based on the amount of borrow actually used on Job No. 1; namely, 4,735 cubic yards. Appellant's claim was based on computation of 4,500 cubic yards. Coaim II was, therefore, more than satisfied.

In Claim V, Appellant contended that the true quantity of borrow for Job No. 4, Project 1113E, was 5,100 cubic yards. The yardage of borrow material as computed by the Government (Exhibit R to the Findings) was 3,568 cubic yards. In new Claim No. VIII, Appellant claimed $1,395 based on amount of borrow alleged to have been hauled for Job No. 5, Project 1554, in the amount of 4,040 cubic yards. The Contracting Officer found the correct yardage to be 3,673 cubic yards for Job No. 5.

The Board has spot-checked the cross sections and computations upon which the decision was based and has found no errors therein. The fact that we found no errors is, of course, not conclusive, but is merely evidence to be considered along with all other evidence on the subject. The verification which we made would not reveal errors in the establishment of elevations and cross sections by the engineers. Deductions were made by the Contracting Officer in connection with borrow hauled from both of the borrow pits. One was for 575 cubic yards of excess material hauled into the road prism which later was wasted in the vicinity of the road (T-385). Another deduction was made for 650 cubic yards used to restore an overexcavated area on Big Lake Dam Parking Lot. See Exhibits "O" and "R" to the Contracting Officer's decision of March 27, 1970.

Appellant's claims for additional borrow alleged to have been hauled are based in part

on unchecked truck haul figures supplied by Joy Pearce, who testified at the hearing (T-279-296). These figures were offered for use in countering the measured in original position computations of the Forest Service which were the basis of the Contracting Officer's decision.

Appellant's claims were also based, in part, on testimony of P. H. Lewis that his engineer examined the job after it was done and prepared sections and made computations from what he was able to see at the time (T-192). The Board rejects as too conjectural both the "after-the-fact" measurements, and the truck-haul testimony of Joy Pearce. These cannot be considered valid measurements of quantity of borrow hauled.

The contract in Specification 51 provides:

> 4.1 The yardage to be paid for shall be the number of cubic yards measured in original position and computed by average end area methods, of material acceptably excavated as hereinabove prescribed.

The evidence shows that this prescribed method was used by the Forest Service, and Appellant has not demonstrated that he is entitled to credit for more earth movement than has been allowed by the Contracting Officer. No additional compensation or time is allowed.

Claim No. 9

This claim relating to Job No. 5, Project 1554, was originally filed for $15,957.40. Appellant alleged that when the work was complete except for backfilling, the Government required that all water pipe be removed, that the trench be made seven inches deeper, and that six inches of sand be put in the trench (T-152-153). New Claim X, also for Job No. 5, is in the amount of $1,380 for pipe in the amount of 690 feet alleged to have been installed but not paid for. New Claim XI is in the amount of $1,184 for 592 feet of pipe allegedly used on Job 5 but not paid for. These two claims when added to original Claim No. 9 in the amount of $15,957.40 make a total of $18,521.40 for pipe.

Specification 22R provides, Section 3.1

> . . . In rock, undercut 6" and backfill with bedding material before pipe installation.

Section 3.2 provides,

> . . . All water pipelines shall be installed not less than twenty-four (24) inches below ground surface . . .

Section 3.5 provides,

> Backfill pipeline trench by hand to a depth of six inches over bedding material and compact.

Appellant claims he was required to remove the pipe from the ditch after it had been approved, excavate deeper and place bedding. Photographs 21, 22, 23, and 24, attached to original findings of the Contracting Officer taken October 20, 1967, show locations where the bedding conditions allegedly did not meet contract specifications. As is the case with many of the other items in controversy in this case there is a difference inthe testimony presented on behalf of the Contractor and that of the Government which cannot be reconciled.

Testimony of the Contractor is that after the ditches had been dug and permission had been given to lay the pipe, the subcontractor was required to remove the pipe and redo the work (T-136, 137, 152). On the other hand, testimony on behalf of the Government was - "In my diaries it shows that they had to go into certain areas of the ditch and overexcavate because of rock that was encountered, but the original subcontractor had been notified and told this was a necessity when installing the pipe line and he knew this at the time when he placed the pipe in the ditch that he would have to take the rock out and put bedding underneath the pipe prior to it being accepted. He elected to go ahead and lay the pipe in the ditch and . . ." (T-374-375).

The sketchy evidence in support of Appellant's claim is far more than offset by the detailed evidence provided by the Government showing the necessity of removing the pipe so that the trench could be deepend to the required

depth and for placing bedding beneath it. Appellant is not entitled to extra compensation or an extension of time. The Appellant did not provide evidence of installing more pipe than that for which compensation was provided as alleged in new Claims X and XI. These claims are also denied.

Claim No. 10

In Claim No. 10 Appellant alleges that partial payments were not made in the amount required by the contract. The only evidence with regard to adequacy of partial payments appears in the appeal file since this matter was not developed at the hearing. In response to this claim, the Contracting Officer's first Finding and Determination states that partial payments were made in accordance with regularly established guidelines. Contract requirement for partial payments appears in Article 7, Standard Form 23-A, which requires that the Government make progress payments monthly as the work proceeds. The article provides, in part

> (c) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer, at any time after 50 percent of the work has been completed, finds that satisfactory

progress is being made, he may authorize any of the remaining progress payments to be made in full.

The Armed Services Board of Contract Appeals has held that a failure to make partial payments as required by the contract, and which weakened the financial structure of the contractor, resulted in a delay for which the contractor was excused and a termination which resulted was for the contractor was excused and a termination which resulted was for the convenience of the Government. George E. Martin & Co., ASBCA No. 3117 56-2 BCA Para. 1150. This Board has ruled that refusal to make a partial payment for work may be the basis for a justified termination of a contract by the contractor. See Robert O. Redding, AGBCA No. 272, 69-2 BCA 7888 and cases cited therein. We are unable to find, however, from the evidence presented, that there was a failure to make progress payments in accordance with the contract. There was some delays because payroll records had not been submitted by a sub-contractor and because some work was covered by snow and couldn't be checked. In any event, even if we should assume that at some stage the Appellant had the right to terminate because of failure of the Government to make progress payments, there was never any attempt to exercise that right.

Claim No. 10 was filed before the Contractor's right to proceed was terminated by the Contracting Officer and subsequent to its filing additional work was performed and additional payments were made, so the figures which appear therein have little significance at this stage of the proceedings. In the case of some items, the amount of work claimed to have been performed as of January 1968 was more than was ultimately allowed on completion of the project. Where evidence was introduced in support of such allegations, it is considered under other numbered claims.

New Claims I through XI

The new Claims I through XI, as noted heretofore, duplicate in some instances Claims 1 through 10, and in such cases this fact will be noted.

New Claims I, IV, VII

These claims all deal with excavation. Under Claim I, Appellant claims $16,493 ($17,928 less $1,435 previously allowed) and a 34-day extension for excavating an extra 2,241 yards of solid rock on Job No. 1 at $8.00 per cubic yard. This claim was subsequently amended (Feb. 3, 1970) to assert that the amount of excavation had been 21,441.38 cubic yards rather than 6,941 cubic yards previously claimed. At the beginning, James Kimball, a Government

employee, referred to computations showing 5,956 cubic yards of excavation on this job for which the Appellant was credited, citing Exhibit N of the Contracting Officer's Findings (T-376-377). One basis cited by Appellant for an equitable adjustment was an admission by the Forest Service that there was an overrun of 26 or 27 percent on the parking lot on Job No. 1 (Bond, T-578).

Two engineering errors were made by the Government. One was an error in the benchmark elevation near the Big Lake Dam Parking Area. It was discovered and the grade of the parking area was changed before the Contractor performed the work. The effect of the error is not clear. By Government measurement, even with the grade change, the Contractor performed and was paid for some 26 or 27 percent extra work in connection with the parking lot excavation. A second error occurred on Job 5, Project 1554, where the 10,000 cubic yards estimated was found to be in error. It should have been 5,500 cubic yards (T-584). The job engineer testified that 5,000 yards had been counted twice in the preparation of the original estimate for the job.

It is the Government's position that taken together the errors did not affect a major item of work by 25 percent of the original amount. This contract contains the Changes and the Changed Conditions clauses of Standard Form 23-A, June 1964 Edition, which is, however, further amplified

by Section 2.2 of General Specifications for Construction of Forest Development Roads and Bridges - General Requirements which reads in pertinent part as follows:

> It is mutually agreed that it is inherent in the nature of road construction that some changes in the plans and specifications may be necessary during the course of construction to adjust them to field conditions and that it is of the essence of the contract to recognize a normal and expected margin of change within the meaning of the clauses "Changes" and "Changed Conditions" in the General Provisions of the contract as not requiring or permitting any adjustment of contract unit prices, provided that any change or changes do not result in (1) an increase or decrease of more than 25 percent in the original contract amount, in the quantity of any major item, or in the length of project, or (2) a substantial change inthe character of the work to be performed under a contract pay item or items that materially increases or decreases the cost of its performance.

In this contract bidders were authorized to quote unit prices for each of the five projects included therein. Although roadway and drainage excavation work is included in each of the five jobs there there was no necessity that a bidder quote the same price per cubic

yard for each job. Further roadway and drainage work is marked as a major item for Jobs 1, 2, 3, and 5, but is not so marked for Job 4, which involved only an estimated 377 cubic yards of excavation.

The argument can be made as the Government does that the work should be considered collectively in determining whether there has been a departure from estimated quantities of more than 25%. Also, it can be argued that this is not the proper interpretation of the contract and for each of four job sheets where the footnote indicates "Major Item" it refers only to the quantity shown on that sheet. Since the documents were prepared by the Government the usual rule of interpretation of an ambiguity against the drafter would prevail.

We prefer to approach the matter from another standpoint, however. The provision which rules against an increase or decrease in contract unit prices, unless there is a change of more than 25% in an item, was, we believe, intended to be applicable where the increase or decrease was reasonably representative of the work expected to be encountered. We do not have such a situation in this case.

The contract called for bids for excavation with no differentiation between excavation of solid rock and of soil cover. If rock had been encountered where it was not expected, the Changed Conditions clause

might be applicable. What happend was that either through a change in plans, or an engineering error, the Contractor was required to perform additional excavation in an area where it was known that excavation would be in solid rock. (T-159, 508).

This work was in no sense representative of the typical excavation that the Contractor offered to perform at a unit price of $1.40 per cubic yard. Accordingly, we note that we have here a substantial change in the character of the work which substantially increased the cost of performance within the meaning of the last clause of the quotation from Section 2.2 of General Requirements - Forest Road and Bridge Construction Specifications which appears above.

For reasons indicated in the considerations of Claim No. 8, we have accepted the Government's measurements of earth in original postion in preference to measurements made by an engineer employed by the Appellant, who attempted to determine quantities after the work had been performed. However, on this item, while we accept the Contracting Officer's determination that 5,956 cubic yards of excavation were performed on Job 1, we hold that the Appellant is entitled to additional compensation on the excess above the original estimate of $4,700 cubic yards.

The Contractor asked for a unit price of $8.00 per cubic yard which we allow less the $1.40 unit price already received. This

means an additional allowance of $6.60 X 1,256, or $8.289.60. The Contractor requested an additional 34 days for extra work inthe Job 1 parking lot area. We have very little evidence in the record to indicate what an equitable adjustment in time would be. Presumably the extra drilling and blasting in this limited area could be done at the same time that other work under the contract was under way. Under the original contract some $233,000.00 worth of work was to be perofmred in 220 days. Using this as a rough yardstick, we allow an additional 8 days for the extra work here involved.

Claim No. IV is for $1,205.40 and a time extension of 3 days in connection with Job No. 4, Project 1113E. Appellant alleges 961 cubic yards of excavation not allowed by the Contracting Officer. Appellant submitted to the Contracting Officer quantity computation sheets and drawings purporting to show excavation quantities and cross-sectional areas of the Lee Valley Road and Parking Area, but did not submit references to field surveys or notes from such surveys. Appellant merely reiterated allegations at the hearing (T-186). The Government in its Exhibits P and Q to the Findings shows computations based on average and area method as required by the contract after yardage was obtained by field surveys of cross-sectional areas recorded in field books. These findings are supported by the Government's testimony (Kimball, T-379-382). The Board finds that the excavation figures of the

Government are amply supported and denies the claim.

In Claim VII, Appellant alleges excavation of 16,776.58 cubic yards on Job No. 5, based on cross sectionand quantity computation sheets. Since these are after-the-fact computations made after completion of the road (See T-191), the Board accepts as more reliable the computation made by the Government in accordance with the contract requirements. Excavation of 5,650 cubic yards is, therefore, found to be correct and the claim for $8,412.60 and an extension of time of ten days are denied.

New Claims No. III and VI
Clearing and Grubbing

Appellant claims $8,412.60 and a three-day extension due to problems in clearing and grubbing in Project 1559, Job 2, and $11,521 and a 15-day extension on Project 1554, Job 5, for a total claim in connnection with clearing and grubbing of $12,741.

Clearing and grubbing was required on Jobs 2, 3, and 5. Claims for additional work were submitted only on Jobs 2 and 5. Appellant claims to have cleared 2.6 acres on Job 2. Payment was made for 1.38 acres (Partial Pay Estimate 13), leaving 1.22 acres for which payment was not allowed or $1,220 at the bid price of $1,000 per acre. Appellant claims to have cleared 19.5 acres on Job No. 5. Payment was made for

1.38 acres (Partial Pay Estimate 13), leaving 1.22 acres for which payment was not allowed or $1,220 at the bid price of $1,000 per acre. Appellant claims to have cleared 19.5 acres on Job No. 5. Payment was made for 7.979 acres. Appellant's claim is for 11.521 acres for which payment was not allowed or $11,521 at $1,000 per acre.

Virtually no evidence was introduced at the hearing in support of Claim III for $1,220. One witness testified hazily concerning clearing performed "on jobs that weren't ours . . . I don't remember a whole lot about it" (Smith, T-111).

Mr. Wood testified for Appellant concerning measurements made of clearing on Job 5. These measurements were made, however, in 1969, of clearing performed in 1967. Mr. Wood did not arrive on the job until July of 1968. He testified that the clearing extended 75 feet from the roadway, although the blueprints specified 5 feet from the roadway (T-18). Mr. Wood testified from memory, not having with him notes which were taken at time of measurement (T-50-55).

Bot with regard to Claim III, and Claim VI, the Forest Service had detailed measurements (Exhibits M and T to the Findings) which listed the station-by-station measurements of the clearing to the dimensions specified in the contract.

The contract, Item 50, Section 4.1 provided,

> The acreage to be paid for under this item shall be the number of acres and fractions thereof, of land shown on the plans or ordered by the Engineer, cleared, grubbed and completed to the satisfaction of the Engineer. . . . Measurements shall include borrow pits, but shall exclude surfacing pits.

Mr. Kimball testified that the acreage was determined by use of slope stake field books (T-388-391). With regard to the claim that Appellant was required to clear outside the limits, Kimball stated that Appellant, instead of piling debris in the middle of the road and burning it, pushed the debris off the side of the road. Appellant later had to clean up that area. This was the only clearing Appellant was required to do outside the clearing limits according to Kimball (T-391-392).

On the basis of the detailed records presented by the Government, and only testimony on the part of the Appellant, based largely on memory, the claims of Appellant for additional time and compensation for Claims III and VI are denied.

General Discussion - New Claims

New Claims I, IV, and VII relating to excavation, and new Claims III and VI relating to clearing and grubbing have been considered under those numerical headings. New Claims II, V, and VIII, relating to borrow were discussed under Claim 8.

New Claim No. IX is for culvert pipe. Appellant alleges that some pipe was installed and not paid for and that other pipe was installed and removed numerous times. To the extent that evidence was introduced at the hearing, relating to culverts, this was considered under Claims 3, 4, 5, 6, and 7.

New Claims X and XI relating to pipe have been considered under Claim No. 9.

Claim for Delay Damages

Appellant included in the complaint a claim for delay damages. Paragraph 20 of the complaint reads in part as follows:

> The contractor claims that over 50% of the time he was on the job the men and equipment were standing by waiting for the Forestry personnel to do their staking, layout and to change the grades and stakes that had been set wrong with a minimum of actual cost to the contractors of $26,330.00.

A claim for damages for delays caused by the Government is one for breach of contract over which a Board of Contract Appeals has no jurisdiction under the Disputes Article in the absence of a specific provision in the contract providing for an adjustment in the contract price because of delays of this kind, such as is provided in a "suspension of work" clause. United States v. Utah Mining and Construction Company, (1966) 384 U.S. 394; T. C. Bateson Construction Co., ASBCA No. 5492, 60-1 BCA Paragraph 2552; Jefferson Construction Co., GSBCA No. 1134, 65-1 BCA Paragraph 4699; Lumen, Inc., ASBCA No. 8364, 65-1 BCA Paragraph 4518; 1964 BCA Paragraph 4436; Wayne Construction, Inc., AGBCA No. 242, 70-2 BCA Paragraph 8443.

There is no suspension of work clause in Appellant's contract, or any other provision providing for damages for delays caused by the Government and, accordingly, this Board does not have jurisdiction to award such damages. This Board may, however, make findings of fact under certain circumstances even though the Board may not make an award. Section 2400.3(e)(1) of the Board's Rules provides in part as follows:

> When, in the consideration of an appeal, it appears that a claim is involved which is not otherwise cognizable by the Board, it may insofar as the evidence permits make findings of fact with respect to such claim without expressing an

opinion or making a finding on the question of liability.

Although Appellant alleged in the complaint certain instances in which delays by the Government resulted in damages (which allegations were duly denied in the Government's answer), the evidence introduced at the hearing was meager and indefinite. When asked how he arrived at the figure of $26,330 for delays, Mr. Phillip H. Lewis testified as follows (T-200-201):

A. Well, that was for being held up at different times for equipment being parked, waiting on inspection, waiting on grades to be shot on roadways, parking areas and parking lots.

Q. Could you give the Board any examples of instances when you were held up, say, on inspection?

A. Well, many times when we worked on the dirt work equipment would be parked, we couldn't use it for months at a time. Numerous times we would ask for inspection on a culvert or water pipeline and we would wait a day or two on that because of hold-ups. In the spring we were held up a day and a half on changes and forms on various items like that.

Giving all possible weight to the foregoing testimony, there is no evidence that the Contractor was unable to perform other work at the time of the allged delays, or that, in fact, other work was not performed during such periods. We find, therefore, that delays alleged by the Appellant to have been caused by the Government in connection with this claim were no more than normal for this type of job.

Default Termination

By telegram dated July 9, 1969, the Contracting Officer terminated the Appellant's right to proceed under the contract. 3/ This

3/ Article 5, Standard Form 23-A (June 1964) made a part of the contract, authorized the Government by written notice to teriminate the contractor's right to proceed. It provided in part,

> (a) If the Contractor refuses or fails to prosecute the work, or any severable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed

(continued on page C-38)

was confirmed by letter of July 10, 1969, setting forth reasons for the default termination. Prior to the default termination, the Contracting Officer met with the Appellant on June 10, 1969, and discussed the items of work remaining to be done at that time. This was confirmed by letter of June 13, 1969, which after setting forth such remaining work, stated:

> Finally it was agreed that all work remaining under the contract would be completed within forty five (45) days from June 16, excluding those days on which an excusable delay occurs . . .

Appellant appealed the default termination of July 9, quoting from a letter of July 3, 1969, stating "My inspection of the work

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3/ (continued from page C-37)

with the work . . .

(b) If fixed and agreed liquidated damages are provided in the contract, and if the government so terminates the contractor's right to proceed, the resulting damages will consist of such liquidated damages until such reasonable time as may be required for completion of the work together with any increased costs occasioned the government in completion of the work.

site on June 27 indicated that sufficient work had been performed to allow you to continue with the contract work.'" Appellant stated further that by "agreement to a forty five (45) day extension the government waived its right to default the contract." Appellant further alleged that reasonable time was not given to comply with the 45-day extension, alleging that on June 26 the Contracting Officer inspected and was satisfied that the work was progressing satisfactorily, and that on July 3, 1969, the Contracting Officer notified the Contractor that the "agreement" was fully operative.

The letter of July 3, 1969, to the Appellant from the Contracting Officer states:

> My inspection of the work site on June 27 indicated that sufficient work had been performed to allow you to continue with the contract work. The determination to let you continue doe snot, however, preclude my taking action to terminate your right to proceed in the future should contract performance become unsatisfactory.

Six days later, on July 9, 1969, Appellant was notified by telegram of termination of his right to proceed. In the letter of July 10, 1969, confirming termination, the Contracting Officer noted that since beginning of the 45-day period on June 10, only $15,000 of work had been completed in 24 calendar days,

or an average of $624 per day, whereas, to complete the work within 45 days, it would have been necessary to complete $1,650 of work each calendar day, and that to complete the remaining work within the remaining days of the 45-day period, Appellant would have to perform an average of $2,760 of work per calendar day.

Finding that since inspection of the work on June 27, only approximately $2,000 of work had been completed, and that timely completion of the work could not be performed by Appellant, the Contracting Officer proceeded with the termination action.

No satisfactory explanation was provided at the hearing to show why the Appellant was able to proceed satisfactorily during the first ten days of the 45-day period but was not able to do so during the second ten-day period. The Contracting Officer stated, "I don't have any idea but the diaries of our inspectors will show you this." (T-327) These diaries were not made a part of the record.

The Board finds that there was no waiver by the Government of its right to default the Appellant when it was agreed between the parties on June 10, 1969, that all work remaining under the contract would be completed in forty five days. The letter of June 13, confirming matters discussed on June 10, listed eight items and set forth definite completion dates. The default

notice found that none of the items had been completed within the time schedule agreed to on June 10.

Unlike the standard service contract, the default provision of Standard Form 23-A, does not require that a cure notice be given, but authorizes the Government by written notice to terminate the Contractor's right to proceed if he fails to prosecute the work ". . . with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, . . ." (underscoring supplied). In an effort both to assist the Appellant, and to take appropriate steps to have the contract completed, the Contracting Officer provided the forty-five day period for completion.

The Government had not elected to terminate the contract when the time specified in the contract (221 days) expired. This did not preclude the establishment of a new completion date which should be reasonable for the circumstances involved. In the case of a fixed price supply contract, if a contractor is given additional time and then defaulted, he may expect that he will have invested additional funds for which he will receive no return. That is not the situation with a construction contract such as was here involved. The Contractor would receive payment or credit for any additional work performed during the period that he was permitted to continue to work. Accordingly, we do not believe that the standard for determining whether the new

completion date is reasonable is quite as severe in a road construction contract as in the case of a fixed price supply contract.

Here the Contractor was given a schedule which required more daily performance in terms of daily dollar earnings than was prescribed in the original contract. However, considering the circumstances involved and the fact that the job had dragged along for a considerable period after the scheduled completion date, we believe that the speedup effort on the part of the Contracting Officer was reasonable.

Upon failure of Appellant to complete any of the items within the time schedule provided on June 10, 1969, default termination on July 9, 1969 was warranted. The contract required completion within 221 calendar days and on July 9, 1969, 286 calendar days of contract time had elapsed (275 if the additional time allowed by this Board is taken into account). The slow progress being made at the time of default termination constituted ample evidence that the work would not be completed until long after expiration of the 45-day cure period which was granted subject to completion of various items within scheduled dates.

The delays in completion of the work were not excusable due to unforeseen causes beyond the control and without the fault or negligence of the Appellant. The Appellant had the burden of proof in an appeal to show

that a delay was excusable. Perry & Wallis, Inc. (1966) GSBCA No. 1447, 66-1 BCA Paragraph 5646. Appellant has not sustained this burden of proof. The record in this appeal discloses that Appellant did not conduct the work in an orderly manner. After a subcontractor installed culverts, Appellant performed a great deal of work with consequent loss of time in causing these culverts to meet specifications. This Board has held that the employment of qualified personnel is the contractor's responsibility, and the failure to do so is not beyond the control and without the fault or negligence of the contractor within the meaning of the default clause of the contract. Cal-Pacific Foresters, AGBCA No. 250 (1970) 70-1 BCA Paragraph 8088.

Reprocurement Costs

Reprocurement costs were assessed against the Appellant following default in the amount of $109,096.84. Appellant argues that these costs were not properly assessed, first because Appellant alleges that the default termination was not proper, and second because reprocurement costs were unreasonably high. We have resolved the first issue and for reasons set forth above find that the default termination was proper. Appellantnext argues that the method of reprocurement produced an unreasonable repurchase price. The Contracting Officer is required upon reprocurement to mitigate damages. In Cal-Pacific Foresters, supra, this Board held that upon a default

termination the contractor is not liable for excess costs of repurchase unless the repurchase is made in a reasonable time and at a reasonable price, citing Standard Engineering & Mfg. Co., ASBCA No. 3733, 57-2 BCA Para. 1477.

The reprocurement contract was awarded upon a lump sum bid basis. The contract price was $114,000. Appellant refers to the Contracting Officer's estimate of work to be done in the amount of $59,000 (T-318) and states that bidders were not bound in any way to the amount. Government Exhibit 10, prepared by James W. Kimball, Construction Engineer, compiled the remaining work on July 8, 1969, at $47,538. Appellant points out that the reprocurement contract costs exceeded the estimate of the remaining work under the original contract at the original unit prices by more than 100 percent.

The Contracting Officer, Mr. Jensen, could not make a judgment as to whether a lump sum bid might make a bidder bid higher than he might otherwise (T-332).

Even though the reprocurement contract was awarded on a lump sum basis, this lump sum price was subject to adjustment to the actual quantities of work performed on the job (T-331).

Appellant has not shown that reprocurement costs were unreasonable or that the work could have been performed for less. Invitations

for bids were sent to twelve prospective bidders and bids were received from five prospective contractors (T-311). Award was made to the low bidder (T-329). Although the Government considered that $59,000 of work remained to be performed at Appellant's contract prices at the time of the procurement, it had an engineer's estimate of $109,000 as the cost of completing the work, taking into account the inflation that had occurred between the award of the original contract and the date of the reprocurement (T-329). The reprocurement contractor performed the work for $109,096.84 as shown in the Government's counterclaim. The work was completed in 37 days, including time for moving equipment onto the job.

There is, however, another matter that should be considered in this connection. In a letter dated July 30, 1969 (Govt. Exhibit No. 3), the Contracting Officer informed the Appellant's bonding company, Employees Commercial Union Insurance Group, that the Forest Service could not enter into any "take-over" agreement for completion of the work with the subcontractor the Welch Construction Co., and their surety, United States Fidelity and Guarantee Co. The testimony of the Contracting Officer on the subject was to the effect that he was not authorized to enter into a takeover agreement with the subcontractor's bonding company (T-335).

If the Contracting Officer failed to mitigate damages for any reason, including lack of authority, this could well be fatal to the Government's claim. We have given careful consideration to this aspect of the record. We have found no offer to take over the project by the subcontractor's bonding company. There may not have even been any direct discussions of the possibility. The Contracting Officer still had the right to approve the contractor who would have completed the work and unless the bonding company was prepared to produce someone with the equipment and know-how to complete the job there would have been no reason to approve any such agreement.

On the basis of the record before us, we hold that the reprocurement actions were reasonable and the Appellant is liable for the amounts paid to the reprocurement contractor which were in excess of the amounts which would have been payable under the original contract. The Government's counterclaim on this item in the amount of $25,718.36 is sustained.

Administrative Costs of Reprocurement

Upon termination of default, the contract provides in Article 5(b) of General Provisions, Standard Form 23-A, that the contractor is liable for liquidated damages until such reasonable time as may be required for final

completion of the work ". . . together with any increased costs occasioned the Government in completing the work." The Government has included administrative costs in its counter-claim aggregating $1,254.94.

Undoubtedly, these costs were in fact incurred by the Government. However, they were incurred at times when the Government was also claiming liquidated damages at the rate of $100.00 per day for failure to complete the work on schedule.

There is no evidence in the record of this particular case as to what the liquidated damages were supposed to cover. At other hearings involving construction contracts, evidence has indicated that the cost of supervision and engineering over a longer period of time, in other words the additional administrative expense, has been an element in establishing the rate of liquidated damages. Certainly the Government cannot collect actual and liquidated damages for the same item.

Additionally, administrative costs are not allowable costs in completing the work upon default in the absence of a provision in the contract specifically providing for such costs. This matter was discussed by the Armed Services Board in the case of Arthur Q. Evans, Jr., ASBCA No. 10951, 66-1 BCA Para. 5316, where it was said,

> . . . Although every reprocurement action undoubtedly involves administrative

> costs, these costs are not normally assessed against a contractor. The only instances we have been able to find where an assessment for administrative costs of reprocurement have been claimed by the Government and sustained by this Board or by the courts have been in instances where the contract specifically provided that a fixed sum would be charged for administrative costs in event of default. On the other hand, the instances where the defaulting contractor was required to pay the excess purchase cost only, without the addition of administrative costs, could be cited almost ad infinitum. . . .

To the same effect are John Francis Bueche, ASBCA No. 12735 (1968) 68-2 BCA Para. 7186; Stanley W. Wasko, t/a Wasko Building and Construction Co., ASBCA No. 12288 (1968) 68-1 BCA Para. 9686; MSI Corporation, VACAB No. 599 (1967), 67-2 BCA Para. 6643; Maeda Gumi, ASBCA No. 11122 (1967) 67-1 BCA Para. 6144; Albert C. Rondinelli, ASBCA Nos. 9838, 10405, 11319, 11400, 11401 & 11443 (1966) 66-1 BCA Para. 5612. Inasmuch as administrative costs claimed by the Government are not a proper item of reprocurement costs under the terms of this contract, the Government claim in the amount of $1,254.94 is disallowed.

Fire Suppression Counterclaim

The Government has submitted a counterclaim in the amount of $137.41 for costs incurred in the suppression of a fire which occurred on June 8, 1967. No evidence was adduced at the hearing on this subject and the Government in its brief has merely asked for the right to collect by set-off, citing authorities in support of the right of the Government to set-off.

Generally, we will not concern ourselves with an attempt by the Government to set off a debt which arose independently of the contract unless the record shows a defect in the Government's claim. David G. Newton Construction, AGBCA No. 236, 71-2 BCA Para. 9093.

In the case before us the claim did not arise independently of the contract. The provisions with respect to liability for fire suppression costs appear in Section 6.4, Fire Prevention and Control of General Requirements, Specifications for Construction of Forest Development Roads and Bridges, which is a part of the contract. It is a matter for which we can grant relief.

The Government may have been well advised not to present evidence on this item in view of the small amount involved and the fact that the Contractor had made a vigorous denial of responsibility for the fire, alleging that there were a number of others,

including campers, in the area at the time of the fire. In any event, the liability of the Contractor has not been established and this counterclaim is disallowed.

SUMMARY

Appellant's claims are allowed in part as follows:

Claim No. 1	
Constructive Change in Fence Specification	$1,145.60
Restoration of Amount Deducted, Change Order No. 3	38.40
Claim No. 6	25.00
Claim No. 7	112.50
New Claim No. I	$8,289.60 and 8 days

Appellant's claims including requests for additional time are otherwise denied. The appeal from the default termination is denied.

The Government's claim for liquidated damages in the amount of $13,200.00 for 132 days of delay in completion is upheld to the extent of $12,400.00, representing 124 days of delay.

The Government's counterclaim for $26,973.30 in increased costs is allowed to the extent of $25,718.36 (reprocurement cost) and disallowed to the extent of $1,254.94 (administrative expense).

The Government's counterclaim for fire suppression expense is disallowed.

/s/ W. E. Underhill
W. E. Underhill, Chairman

/s/ Paul E. Nylander
Paul E. Nylander, Member

/s/ John H. Shouse
John H. Shouse, Member

Done at Washington, D. C. this

20th day of December 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2043

P. H. LEWIS, doing business as
AIRCO ENGINEERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a government contractor, contends that the Court of Claims improperly granted summary judgment to the government in his Wunderlich Act suit contesting the government's termination of his contract, award of damages resulting from his default, and denial of his claim for extra costs.

Petitioner contracted with the Department of Agriculture to construct roads and a recreation area in the Apache National Forest in Arizona. In 1969, when it became apparent that petitioner would not complete the work within the time stipulated for performance, the Department terminated the contract for default, and entered into a reprocurement contract with another company (Pet. App. C-37 to C-46). The government contracting officer subsequently assessed costs of approximately $40,000 against petitioner for liquidated damages and the increased

costs of completion of the work following petitioner's default (Pet. App. C-2, C-50 to C-51). Petitioner then appealed to the Board of Contract Appeals of the Department of Agriculture, contesting the propriety of the default termination and the amount of costs assessed against it. In addition, petitioner claimed approximately $100,000 in damages against the government for alleged "extra" costs incurred by petitioner while engaged in the projects. The Board, after a full evidentiary hearing, affirmed the default termination and the award of costs against petitioner. The Board also upheld petitioner's claim for extra costs to the extent of an award of $9,625.10 (Pet. App. B-29).

Petitioner then brought this action in the Court of Claims under the Wunderlich Act, 41 U.S.C. 321-322, to review the Board's decision. After both sides moved for summary judgment, the trial judge, in a comprehensive and detailed opinion, recommended that the decision of the Board be sustained, concluding that substantial evidence supported its decision and that all of petitioner's claims were without merit (Pet. App. B-28 to B-29). The Court of Claims adopted the trial judge's decision, and accordingly dismissed petitioner's complaint (Pet. App. A-1 to A-2).

1. Although petitioner himself moved for summary judgment, he now contends that "[g]enuine issues of material fact precluded summary judgment" (Pet. 5) and that the grant of summary judgment by the Court of Claims denied him "a full and open hearing" (Pet. 8). The Wunderlich Act, however, provides that decisions of a government contract appeals board shall be final and conclusive unless fraudulent, capricious or arbitrary, made

in bad faith, or "not supported by substantial evidence." 41 U.S.C. 321. Thus, the sole function of the Court of Claims in a Wunderlich Act suit is to determine whether the administrative decision was in accordance with law and was supported by "substantial evidence" in the administrative record. The court properly performed this limited review function on cross-motions for summary judgment. See, *e.g.*, *National Broadcasting Company* v. *United States*, 319 U.S. 190, 227; 6 Moore, *Federal Practice*, par. 56.17[3] (1974 ed.). This Court has specifically held that review in a Wunderlich Act suit is limited to the administrative record and that a trial *de novo* in the Court of Claims is improper. *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709.

2. There is no merit in petitioner's argument (Pet. 4) that the administrative decision is not supported by substantial evidence. The evidence supporting the administrative decision is exhaustively set forth in the careful opinions of both the Board and the Court of Claims trial judge, upon which we rely (Pet. App. C-1 to C-51; B-1 to B-29). Further review by this Court of these factual findings is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10